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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF COLORADO,

Petitioner,

—vs.—

ANTONIO GUADALUPE NUNEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS *AMICUS CURIAE*

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SUMMARY OF ARGUMENT

1. Certiorari was improvidently granted herein because the decision to suppress the evidence in question was not a final judgment within the meaning of 28 U.S.C. § 1257.

2. Even if this Court has jurisdiction under 28 U.S.C. § 1257, the decision below rests on independent and adequate state grounds. The Colorado court merely applied Colorado's flexible evidence rules governing the informant's privilege and adopted an order of preclusion as the means to enforce its discovery order. Such a decision does not involve a construction of the Fourth Amendment. Even if Fourth Amendment principles might dictate a similar result, the Colorado court's action was an application of Colorado's evidence and discovery rules and, thus, is not appropriate for review by this Court.

3. The only question properly before

this court is whether Colorado may adopt a flexible set of evidence rules governing the informant's privilege and elect to sanction non-compliance with an order of preclusion. No basis exists for arguing that states must recognize an absolute informant's privilege. Similarly, once a state adopts a flexible rule governing the informant's privilege, it is free to adopt suppression as an appropriate means of enforcing discovery orders.

INTEREST OF AMICI*

The American Civil Liberties Union is a non-partisan membership organization of 250,000 persons dedicated to preserving and enforcing our constitutional heritage. The right to confront an anonymous informant in order to challenge his or her veracity is a matter of fundamental fairness. Where, as here, a state court adopts flexible rules of evidence permitting the targets of an anonymous accusation to discover an informant's identity under certain conditions and adopts appropriate preclusion sanctions for a failure to comply with discovery, the state advances basic fairness without the necessity of passing on constitutional issues. In this case, the Colorado courts have advanced interests of fundamental fairness, not by the

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* Consents to the filing of this brief Amici Curiae have been obtained from the parties. Letters of consent from each party will be lodged with the Clerk of the Court.

enunciation of constitutional law, but on the basis of adequate and independent state-law grounds. Amici respectfully submit this brief in support of the power of a state court to protect and preserve fundamental fairness by the adoption of enlightened state rules of evidence and discovery.

I

THE WRIT OF CERTIORARI
SHOULD BE DISMISSED
FOR WANT OF JURISDICTION

Under longstanding and settled law, this Court lacks jurisdiction over this case, which arises on an interlocutory appeal from a motion to suppress. Accordingly, the writ should be dismissed as improvidently granted.

The statute which grants this Court jurisdiction to review state court decisions, 28 U.S.C. § 1257, denies the Court power to review judgments which are not "final." A criminal case has repeatedly been held to be "final" within the meaning of § 1257 only upon entry of a sentence. See, e.g., Parr v. United States, 351 U.S. 513, 518 (1956); Bateman v. United States, 429 U.S. 1302 (1976).[1]

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[1] Prior to the enactment of 18 U.S.C. § 3731, the Court decided a single non-final state criminal case. California v. Stewart, reported sub nom Miranda v. Arizona 384 U.S. 436, 498 n. 71 (1966). We have been unable to discover a single subsequent case relying [cont'd. on next pg]

Even in cases arising from federal courts, where this Court has statutory power to review non-final cases under 28 U.S.C. § 1254, the Court has adopted a policy as a prudential matter of not reviewing criminal cases which arise on interlocutory appeal.

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on Stewart, or addressing whether the limited exception of that case would apply. In five additional cases, the jurisdictional question was not raised by the parties and appears to have escaped the Court's attention as well. Michigan v. Tyler, 436 U.S. 499 (1978); United States v. Washington, 431 U.S. 181 (1977) (review from local D.C. case); Illinois v. Lafayette, 77 L. Ed. 2d 65 (1983); Illinois v. Andreas, 77 L. Ed. 2d 1003 (1983); Illinois v. Batchelder, 77 L. Ed. 2d 1267 (1983). In light of Cogen, DiBella, and the failure of Congress to overrule those cases when it enacted 18 U.S.C. § 3731, we do not believe that these unexplained decisions support jurisdiction over this case under § 1257.

See e.g., Flynt v. Ohio, 451 U.S. 619 (1981); Abney v. United States, 431 U.S. 651, (1977); DiBella v. United States, 369 U.S. 121 (1962). The Court has stressed that this prudential policy is based on longstanding Congressional policy. DiBella, supra. The only exception the Court has made has been for the special case of double jeopardy, where the very constitutional right could not be vindicated without departing from the otherwise uniform judicial rejection of interlocutory review of criminal cases.

In light of these considerations, it is hardly surprising that this Court has steadfastly held that the grant or denial of an interlocutory appeal of a motion to suppress is not "final" within the meaning of §§ 1254 and 1257. Cogen v. United States, 278 U.S. 221 (1929); DiBella v. United States, supra.

The relatively recent enactment of a statute authorizing appeal by the federal

government from certain motions to suppress under carefully specified circumstances and procedures, 18 U.S.C. 3731, confirms that decisions on interlocutory motions to suppress are not "final" within the meaning of the appellate jurisdictional statutes. First, if such decisions were "final," there would have been no need for enactment of § 3731, which creates an exception to 28 U.S.C. § 1291. Moreover, as enactment of § 3731 demonstrates, Congress was perfectly capable of altering the appellate jurisdictional statutes to permit interlocutory review of motions to suppress when it chose to. Congress' failure to permit review of motions to suppress arising from state courts at the same time it permitted such review in certain federal cases must be seen as a deliberate legislative choice this Court is not free to overturn. Cf. TVA v. Hill, 437 U.S. 153 (1978).

Any suggestion that the factors set forth in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), would permit this Court to take jurisdiction in this case is untenable. Jurisdiction is unavailing under Cox for precisely the same reasons the Court recently dismissed the writ of certiorari for want of jurisdiction in Flynt v. Ohio, supra.

The Court observed in Flynt that "in most, if not all, of the cases falling within" the Cox exceptions, "not only was there a final judgment on the federal issue for purposes of state court proceedings but there were no other federal issues to be reviewed," and thus "no probability of piecemeal review with respect to federal issues." 451 U.S. at 621. Here, as in Flynt, however, "it appears that other federal issues will be involved in the trial court." Id. Indeed, the very frequency of a variety of constitutional issues that arise in nearly every criminal

case goes far to explaining the absence of interlocutory review of criminal cases under the Cox exceptions.[2]

The only justification for departing from the clear command of § 1257 can be a belief that, notwithstanding the clear congressional directive, a state should always be permitted review in this Court of a decision which affects its interests. According to that argument, since the criminal case here sought to be reviewed might, if not reviewed by this Court now, result in an acquittal,[3] the state needs review now to

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[2] The four Cox categories, found inapplicable in Flynt, are inapplicable here as well. The third category, the most nearly available, is not satisfied here because the state could "lose on the merits," e.g. by dismissal of the indictment prior to trial and still bring the question raised up on review from that final judgment. The fourth is even less arguably applicable here than it was in Flynt, since the "refusal immediately to review the state court decision" would not erode any identifiable federal policy.

[3] It is, of course, equally likely that the [cont'd. on next pg]

ensure that it gains review at some point. There are two insuperable difficulties with that approach.

First, it consigns the congressional limitations on this Court's review in § 1257 to mere "policies," whereas § 1257 is jurisdictional, especially as concerns criminal cases, and especially in light of Congress's failure to pass a counterpart to 18 U.S. § 3731 for state court rulings on motions to suppress.

Second, a doctrine affording the state an opportunity to remedy in this Court every ruling against its interests is contrary to this Court's repeated rejection of a similar argument where individual rights are concern-

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state courts, assuming that there was no other evidence against Mr. Nunez, would order the indictment dismissed. In that event, presumably the state would be able to seek review without any bar by either § 1257 or the double jeopardy clause.

ed. Again and again in recent years, when the Court has determined that various infringements of individual rights are not subject to review because of statutory or judge-made barriers, it has rejected the argument that those barriers should fall to permit judicial review, even when without such relaxation the individual whose rights were violated would be left without judicial protection. See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978); City of Los Angeles v. Lyons, 75 L. Ed. 2d 675, 690-91 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); Chappel v. Wallace, 76 L. Ed. 2d 349 (1983); Fitzgerald v. Nixon, 73 L. Ed. 2d 349 (1982).

If the Court refused to bend prudential or equitable barriers to the vindication of constitutional rights in those cases (and others), surely its solicitude for Colorado's right to bring an immediate interlocutory

appeal of an order to reveal an informant should not be greater.

II

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE COLORADO SUPREME COURT BECAUSE IT RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

Petitioners seek to characterize this case as an effort to remedy an "emasculation" of the informant's privilege. However, in ruling that the informant's privilege may not defeat limited discovery aimed at testing the veracity of statements made in support of a search warrant by an anonymous informant, the Colorado Supreme Court decided, not a federal question, but merely an issue of Colorado evidence law. Moreover, in electing to utilize an exclusionary rule as a means to enforce its discovery ruling, the Colorado court merely exercised the power to select an enforcement mechanism which it deemed approp-

riate to implement Colorado evidence law. Unless petitioner is prepared to argue that prosecutors are constitutionally entitled to an absolute informant's privilege regardless of applicable local law, no federal question whatever is posed by this appeal. Nothing in the decision of the Colorado court suggests that its ruling was based on federal law. Indeed, by relying on earlier Colorado cases such as People v. Dailey, 639 P.2d 1068 (1982) and People v. Bueno, 646 P.2d 931 (1982), the Court below reiterated the state law basis for its decision. Unless state courts are forbidden by a provision of the federal constitution from adopting flexible evidence rules governing the informant's privilege and from adopting appropriate tools for implementing their discovery orders, no federal question is posed by this case.

In an effort to create a federal question, petitioners appear to argue that the

Colorado court was applying Fourth Amendment principles when it ordered the suppression of evidence. Not every decision to preclude proof is, however, a Fourth Amendment decision. The issuance of a preclusion order as a sanction for the failure to comply with a discovery order is a routine exercise of judicial superintendence. While Fourth Amendment principles might well have dictated a similar result in this case, the fact remains that the court below was merely enforcing Colorado law, not the Fourth Amendment. Accordingly, whatever the result might be as a matter of Fourth Amendment jurisprudence[4], the decision of the Court below was based on

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4. Given the existence of adequate and independent state grounds upholding the decision below, a discussion of whether the Fourth Amendment would require the same result would be an advisory opinion and, thus, beyond the jurisdiction of the Court. E.g., Minnesota v. National Tea Company, 309 U.S. 551, 557 (1940); Herb v. Pitcairn, 324 U.S. 117 (1945).

adequate and independent state law grounds and, thus, may not be disturbed. E.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

In South Dakota v. Neville, 74 L. Ed 2d 748 (1983), the Court ruled that when a state court decision purports to rest on both Federal and State constitutional grounds, review of the Federal constitutional question is appropriate in those settings where it appears that the Federal and State constitutions were viewed as identical. 74 L. Ed 2d at 754, N. 5. Thus, where the interpretation of a state constitutional provision appears to turn on a construction of a parallel federal provision, the state ground is adequate, but not independent. Delaware v. Prouse, 440 U.S. 648 (1979).

In the instant case, however, the Colorado court did not adopt its evidence rules

because it wished to establish state rules which paralleled and were required by the Fourth Amendment. Indeed, in People v. Dailey, 639 P. 2d 1068 (1982), the Colorado Supreme Court explicitly recognized that in fashioning evidentiary rules governing the informant's privilege it was relying upon "state law" and quite possibly going beyond Fourth Amendment requirements. 639 P. 2d at 1075. Accordingly, the Colorado decision rests upon both adequate and independent state law grounds within the meaning of Neville.

III.

THE FEDERAL CONSTITUTION DOES NOT BAR A STATE FROM PERMITTING A DEFENDANT TO DISCOVER THE IDENTITY OF AN ANONYMOUS INFORMANT IN ORDER TO CHALLENGE HIS VERACITY

A defendant might well be expected to argue that the federal constitution guarantees him the right to discover the identity of an anonymous informant in order to challenge his veracity. However, whatever the correct resolution of such a constitutional argument, Colorado chose to resolve it on state law grounds by permitting the discovery of informants' identities under certain circumstances as a matter of Colorado evidence law. Moreover, Colorado chose to enforce its discovery rule by imposing a preclusion sanction on a prosecutor who failed to comply with a discovery order. Thus, the precise issue posed by this case is not whether Colorado must adopt a flexible informant's priv-

ilege rule and back it up with a preclusion sanction, but whether it may do so. See PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

Petitioners have cited numerous cases in which this Court has attempted to draw the appropriate balance between a defendant's right to know and the state's right to confidentiality. However, each case deals with the extent to which states must provide a defendant with information. With respect, they are utterly irrelevant to the question of whether a state may choose to provide more information than the Fourth Amendment requires.[5] Just as this Court in PruneYard

[5] Amici believe that had Colorado elected to adopt a regressive policy and deny discovery herein, the principles of the Fourth and Fourteenth Amendments would have been violated. Given the adequate and independent state law ground on which the decision below rests, it is both unnecessary and improper to reach the constitutional question.

upheld California's right to go beyond the reach of the First Amendment in the context of privately owned shopping centers, so Colorado is entitled to go beyond petitioner's view of the Fourth Amendment in the context of anonymous informants. It can hardly be contended that the federal constitution forces the states to use anonymous informants when they do not wish to do so.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed.

Respectfully submitted,

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* Counsel appreciate the assistance of Elvia Rosales Arriola, a graduate of the Boalt Hall School of Law, University of California, Berkeley, in preparing this brief.